

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 2, 2007¹

HAROLD JACKSON v. THELBERTA CLARK SELLS

Appeal from the Circuit Court for Franklin County
No. 11,623-CV J. Curtis Smith, Judge

No. M2005-00378-COA-R3-CV - Filed on April 17, 2007

This lawsuit was filed originally by Harold Jackson (“Plaintiff”) seeking to establish his right to use an easement located on land owned by Thelberta Clark Sells (“Defendant”). Following a trial, the Trial Court determined that Plaintiff had established his right to an easement. The Trial Court established the physical parameters of the easement and prohibited Defendant from interfering with Plaintiff’s proper use of the easement. The Trial Court’s judgment establishing Plaintiff’s entitlement to the easement was not appealed and became a final judgment. Shortly thereafter, Plaintiff filed a petition for contempt claiming Defendant had erected a fence over the easement and otherwise obstructed Plaintiff’s use of the easement. Defendant denied she was in contempt and requested the Trial Court “move” the easement to a more convenient location. The Trial Court found Defendant in contempt of court and refused to “move” the easement. Defendant appeals, and we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Circuit Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Joseph E. Ford, Winchester, Tennessee, for the Appellant, Thelberta Clark Sells.

Mark Stewart, Winchester, Tennessee, for the Appellee, Harold Jackson.

¹ This appeal was assigned to this panel on April 2, 2007.

OPINION

Background

The record on appeal in this case begins with an order entered by the Trial Court on April 23, 2003. This order provides, in relevant part:

This cause came on to be heard for trial on May 9, 2002, ... upon the Complaint heretofore filed by Harold Jackson against the Defendant, Thelberta Clark Sells, and it appearing to the Court based upon the testimony of the parties, the testimony of all witnesses, the argument of counsel and the record as a whole ... that the Plaintiff's action against the Defendant to establish said road having been proven and sustained, and once having been established, pursuant to the case of Hall v. Pippen, (Tenn. Ct. App. 1998), the burden shift(ed) to the Defendant to prove abandonment of said road by clear and convincing evidence, which the Defendant has failed to do in this cause, the Court finds in favor of the Plaintiff with regard to the road sought in this action, which is twenty-five feet in width, running from the country road, known as old Clark Road, to the foot of the mountain to the two tracts of property owned by the Plaintiff

Although not contained in the record on appeal, Defendant apparently filed a motion to alter or amend the judgment or for a new trial, asking that the easement be moved away from her house to another area of her property, which motion was denied by the Trial Court. No appeal was taken from the April 29, 2003, order or the denial of Defendant's motion for new trial. The Trial Court's order of April 29, 2003, therefore, became a final judgment.

In May of 2004, Plaintiff filed a petition for contempt claiming that Defendant, "personally or through her agents and/or employees, has constructed barriers and blocked the road [upon] which the Plaintiff was awarded [an easement]" by the Trial Court's April 2003 final judgment. Plaintiff sought an order holding Defendant in contempt as well as an award of attorney fees.

Defendant responded to the petition for contempt, generally denying the pertinent allegations contained therein. Defendant also asserted, *inter alia*:

[Defendant] denies that she has kept the [Plaintiff] from being able to have access to the property behind hers and would in fact show that she and her husband, at their expense, have built a better easement to the property and graveled the same so that the [Plaintiff] herein can have access to his property by foot or even automobile. They would

show that this new road built at their expense, is much better than the wagon path that was previously used.

A hearing was conducted on Plaintiff's petition for contempt. While this Court has not been provided with a transcript from that hearing, we have been provided with a Tenn. R. App. P. 24(c) statement of the evidence. The pertinent portion of Defendant's testimony is summarized in the statement of the evidence as follows:

At the trial of the Petition for Contempt the [Defendant] testified that the placement of the easement originally declared by the Trial Court was problematic to her because the easement was within just a few feet from her home. She complained that the [Plaintiff's] use of the easement at that area would endanger her grandchildren who play in and about that area.... She testified that after the original trial of this matter she had caused to be filed a Motion for a New Trial or to Alter or Amend to ask that the easement be moved to another area of her farm so that it would not disrupt her quiet enjoyment and use of her property and specifically her home.

Defendant then testified that, following the denial of her motion for new trial, she had a new gravel road built on her property. Defendant requested the Trial Court "move" the easement granted to Plaintiff from the location set forth in the original judgment to the location of the new road.

On January 14, 2005, the Trial Court entered an order resolving Plaintiff's petition for contempt as follows:

The original plaintiff and petitioner herein, Harold Jackson, hereinafter Mr. Jackson, has filed a contempt petition against the original defendant and respondent herein, Thelberta Clark Sells, hereinafter Ms. Sells. Mr. Jackson alleges Ms. Sells has intentionally obstructed the prescriptive easement granted him in the original litigation between the parties. The court finds Ms. Sells has intentionally obstructed the easement by removing a gate and erecting a fence and by placing large bales of hay on the easement. While the proof was unclear whether any such obstructions now remain, the obstructions were in place upon the filing of the petition. Ms. Sells is in contempt of court. She shall remove all obstructions and return the easement to the same general condition as existed before the disagreement between the parties that resulted in Mr. Jackson's original suit. Ms. Sells shall pay Mr. Jackson's reasonable attorney's

fee for filing and pursuing his petition for contempt and such fee will be set by the court, absent an agreement between the parties.²

The court finds the quantity of use of Mr. Jackson's easement was determined and fixed at the time it was acquired.... Mr. Jackson's use of the easement is confined ... "to the exact use originally made thereof, or the common and ordinary use which was made of it during the period of prescription; or the user (sic) in which the owner of the land acquiesced." ... Therefore, Mr. Jackson may make no changes or improvements to the easement that will materially increase, or impose a new or additional burden on Ms. Sells' property.

Ms. Sells argues the court should move the easement to a location more convenient to her.... While this issue was not raised by the pleadings, it was presented and argued at the hearing, therefore, the pleadings are amended to conform with the proof on the issue. The court finds ... that an easement once established, cannot be relocated without the consent of both the owners of the dominant and the servient estates.... (citations omitted)

Defendant appeals raising one issue: "Whether the Trial Court erred in failing to ratify the moving of a previously established easement for ingress and egress to another portion of the servient tenant's property due to an increase in the burden of the easement on the servient tenant's property." Plaintiff claims the issue raised by Defendant was not properly submitted to the Trial Court and, therefore, is not properly before this Court.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

As stated previously, Defendant claims the Trial Court erred "in failing to ratify the moving of a previously established easement for ingress and egress to another portion of the servient tenant's property *due to an increase in the burden of the easement on the servient tenant's property*." (emphasis added) The proof set forth in the statement of the evidence completely fails to establish that there has been any *increase* in the burden on the servient tenant's property. The current

² The parties later agreed that Plaintiff's reasonable attorney fee was \$750.00.

problems Defendant has with the easement as originally established by the Trial Court are the very same problems that existed when the Trial Court made its initial ruling. Stated differently, any current burden on Defendant's property is the exact same as it was when the case was tried originally. Thus, what we actually are addressing on this appeal is a claim by Defendant that the initial judgment was incorrect. Unfortunately for Defendant, she chose not to appeal the Trial Court's initial determination and that determination became a final judgment. Defendant cannot now attack that final judgment.

Because Defendant has failed to establish any increase in the burden on her land, we need not decide whether the Trial Court had the authority to "move" the easement upon a showing that the burden on the servient tenant's property had been increased. As to any future increase in the burden on Defendant's land, both parties should keep in mind that the Trial Court informed Plaintiff that he "may make no changes or improvements to the easement that will materially increase, or impose a new or additional burden on [Defendant's] property." The judgment of the Trial Court refusing to "move" the easement, therefore, is affirmed.³

In light of our conclusion affirming the Trial Court's refusal to move the easement, the issue raised by Plaintiff is pretermitted.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, Thelberta Clark Sells, and her surety.

D. MICHAEL SWINEY, JUDGE

³We note that Defendant does not challenge the Trial Court's finding that she was in contempt.